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Supreme Court, U.S.
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No. 04-1257

In The
Supreme Court of the United States

FRANCES D. KETTENBACH,

Petitioner,

v.

RAFAELE LORAIN DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF EVAN G. DEMOULAS AND NEXT FRIEND OF VANESSA EVAN DEMOULAS, DIANA D. MERRIAM, FOTENE J. DEMOULAS, ARTHUR S. DEMOULAS AND EVANTHEA DEMOULAS,

Respondents.

On Petition For A Writ Of Certiorari To The Appeals Court For The Commonwealth Of Massachusetts

BRIEF OF RESPONDENT, RAFAELE LORAIN DEMOULAS, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Frances Kettenbach ("Ms. Kettenbach") waited until beyond the eleventh hour, after even the stroke of midnight, to raise her claim that the Commonwealth of Massachusetts' procedure for judicial consideration of a litigant's motion to recuse the presiding judge violates her due process rights under the United States Constitution. Ms. Kettenbach's Petition for a Writ of Certiorari should be denied because she waived this argument by not submitting it in a timely manner in the proceedings below, which included repeated recusal motions to the Massachusetts Superior Court and no fewer than three separate appeals to the Massachusetts Supreme Judicial Court.

Her Petition also should be denied for the separate and independent reason that the Massachusetts recusal procedure does not violate her due process rights, but rather is similar on the challenged point to the Federal procedure which has been held to exceed constitutional requirements. This is particularly true where Ms. Kettenbach's most recent recusal motion was considered – and denied – by a judge other than the one whom she challenged.

Further, despite Ms. Kettenbach's contention, there is no evidence of an existing "conflict among state courts" warranting review by this Court, and for this reason, too, her Petition should be denied.

ARGUMENT

I. MS. KETTENBACH WAIVED HER PURPORTED CONSTITUTIONAL CLAIM.

Ms. Kettenbach waived her argument that the Massachusetts procedure for determining recusal motions is unconstitutional. She did not raise that argument until after the successive recusal motions she and her co-defendants had submitted to the Massachusetts Superior Court had been reviewed by the Massachusetts Supreme Judicial Court three separate times. *See Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 524-26 (1997); *Demoulas v. Demoulas Super Markets, Inc.*, 428 Mass. 453 (1998); *Demoulas v. Demoulas*, 432 Mass. 43, 45-55 (2000).

Neither Ms. Kettenbach, nor any of her co-defendants, raised the constitutional argument she advances in her Petition for a Writ of Certiorari to the Massachusetts Superior Court in connection with their repeated recusal motions. None of them raised that issue in any of their prior serial appeals to the Massachusetts Supreme Judicial Court. None of them raised it in their appeal to the Massachusetts Appeals Court[1] of the Superior Court's most recent recusal decision, which in fact was issued by a different judge than the one challenged. Rather, the first time Ms. Kettenbach made the argument was in her application to the Massachusetts Supreme Judicial Court for further appellate review – a decade after her first recusal motion was denied.

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[1] The Massachusetts Appeals Court is the State's intermediate appellate tribunal.

For these reasons, Ms. Kettenbach is deemed to have waived her constitutional challenge to the Massachusetts recusal procedure set forth in *Haddad v. Gonzalez*, 410 Mass. 855, 862 (1991), and *Lena v. Commonwealth*, 369 Mass. 571, 579 (1991). "The general rule is that an issue not raised in the trial court cannot be argued for the first time on appeal." *M.H. Gordon & Son, Inc. v. Alcoholic Bevs. Control Comm'n*, 386 Mass. 64, 67 (1982). The waiver doctrine "applies equally to constitutional claims." *Commonwealth v. Watson*, 409 Mass. 110, 112 (1991), *quoting Commonwealth v. Deeran*, 397 Mass. 136, 139 (1986); *see Commonwealth v. Amirault*, 424 Mass. 618, 639 (1997); *Commonwealth v. Cote*, 386 Mass. 354, 358-59 n.6 (1982).

II. THE MASSACHUSETTS RECUSAL PROCEDURE DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

The Massachusetts recusal procedure set forth in *Haddad* and *Lena* does not violate the due process clause of the United States Constitution.

Ms. Kettenbach incorrectly contends that the "self-analysis" required by the Massachusetts authority is fundamentally flawed because the judge accused of bias is the one conducting that analysis. Petition, p. 13. That argument is immaterial here, since Ms. Kettenbach's and her co-defendants' most recent recusal motion, which was dressed as a Massachusetts Rule of Civil Procedure 60(b) motion,[2]

[2] Massachusetts Rule of Civil Procedure 60(b) is modeled on Federal Rule of Civil Procedure 60(b). *See* 1973 Reporter's Note to Mass. R. Civ. P. 60.

in fact was considered and decided by a judge *other than* the judge challenged in that motion. Thus, the purported constitutional infirmity in the *Haddad* and *Lena* approach is immaterial.

Moreover, the Massachusetts approach satisfies both State and Federal due process concerns, as the Massachusetts Appeals Court has already determined. *See Howe v. Prokop*, 21 Mass. App. Ct. 919 (1985) (*Lena*'s recusal test satisfies requirements of both Article 29 of the Massachusetts Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States).

It is well-established that a litigant's due process rights are not violated when the challenged judge decides a recusal motion directed against him or her. *See James v. Luebbers*, 359 F.3d 1005, 1015 (8th Cir. 2004). Indeed, that is the approach taken under the Federal recusal statutes, 28 U.S.C. §§ 144, 455, which require the substantially same analysis by the challenged judge as to whether he or she has "a personal bias or prejudice" and whether his or her "impartiality might reasonably be questioned" as do *Lena* and *Haddad*. Notably, the Federal statutes have been held to "establish a more stringent standard for disqualification than is required by the right to a fair trial guaranteed by the due process clause." *S. Pac. Comm. Co. v. Am. Telephone & Telegraph Co.*, 740 F.2d 980, 990 n.9 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985); *accord United States v. Haldeman*, 559 F.2d 31, 130 n.276 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977).

For these reasons, one safely may assume that Ms. Kettenbach, who was formerly represented by different counsel, did not previously overlook her newly minted constitutional argument but rather knew it to be meritless,

as did her co-defendants (who to this day have never advanced such an argument notwithstanding that assets and cash arguably worth in the neighborhood of one billion dollars are at issue).

III. THERE IS NO CONFLICT AMONG STATE COURTS WARRANTING THIS COURT'S REVIEW.

Contrary to Ms. Kettenbach's contention, there is no conflict among State courts rising to a level which warrants review by this Court. It may be true, as Ms. Kettenbach suggests relying solely on citation to a single treatise, that *in 1994* the various States afforded the challenged judge a somewhat different role in reviewing a recusal motion. *See* Petition, p. 17, *citing* Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 Val. U. L. Rev. 543, 545-47 & n.5 (1994). Yet, Ms. Kettenbach's Petition gives no indication of whether that supposed split still exists today, *more than a decade later*. Ms. Kettenbach offers no explanation as to why this Court should resolve a supposed split which she has not demonstrated still exists.

More fundamentally, the purported split Ms. Kettenbach identifies is not germane here. She claims that in the majority of States, including Massachusetts, the challenged judge decides the recusal motion, while in "several other" jurisdictions the challenged judge does nothing more than review "the timeliness of the motion and the legal sufficiency of the supporting affidavit" before referring it to another judge if legally sufficient, and, in "the remaining States" the motion is referred to another judge in every instance. Yet, here, the Massachusetts courts repeatedly found Ms. Kettenbach's and her co-defendants' recusal motions to be legally insufficient. Indeed, Ms.

Kettenbach's and her co-defendants' most recent recusal motion (dressed as a Rule 60 motion), which built upon all their prior recusal motions, was considered (and denied) by a different Massachusetts Superior Court judge, not the one challenged in her motion. Accordingly, Ms. Kettenbach received the review procedure advocated in her Petition.

Finally, as discussed above, Ms. Kettenbach has not demonstrated that the recusal procedure followed by Massachusetts, and apparently a majority of the other States, is constitutionally defective. There is little cause for this Court's resources to be expended addressing a supposed split which affects no one's substantial rights.

CONCLUSION

For the foregoing reasons, this Court should deny Ms. Kettebach's Petition for a Writ of Certiorari.

Respectfully submitted,

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By her attorney,

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